No. 94-147

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In The

Supreme Court of the United States

October Term, 1994

THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH, and KENNECOTT CORPORATION,

Petitioners,

vs.

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's recent opinion in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), holding that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders," govern the appealability of a district court's denial of entry of a consent decree proposed by a government trustee.

2. Whether a trustee authorized to assess natural resources damages and seek recovery for such damages on behalf of the public has an "explicit statutory guarantee of immunity from trial" so that the refusal by a district court to enter a consent decree proposed by that trustee presents grounds for an immediate appeal under the collateral order doctrine.

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INTRODUCTION

The Petition for Certiorari seeks review of a Tenth Circuit Court of Appeals' order denying § 1291 review of a district court's denial of the entry of a proposed consent decree between the State of Utah, acting as trustee on behalf of the public ("Utah") and Kennecott Corporation ("Kennecott") on the grounds that the proposed settlement was not fair and consistent with the purposes that CERCLA is intended to serve.

Neither Utah nor Kennecott moved for the district court's certification under 28 U.S.C. § 1292(b).

In denying jurisdiction, the Tenth Circuit Court of Appeals relied on its earlier opinion in *Desktop Direct, Inc. v. Digital Equipment Corp.*, 993 F.2d 775 (10th Cir. 1993) ("*Desktop*"), which opinion was recently affirmed by this Court in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994) ("*Digital Equipment*"). In *Digital Equipment*, this Court held that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." 114 S. Ct. at 1994.

Contrary to the argument of Utah and Kennecott, the Petition does not involve the denial of a right "explicitly guaranteed by a particular constitutional or statutory provision." Rather, Petitioners seek to circumvent the finality requirements of § 1291 by erroneously arguing that because CERCLA encourages settlement of claims, it necessarily follows that a trustee appointed pursuant to CERCLA has an "explicit statutory right" to settle on its own negotiated terms and avoid trial. There is no such right.

This Petition does not present a special or important issue, nor is it in conflict with *Digital Equipment* or with decisions of other United States Courts of Appeals. *Digital Equipment* is controlling. The Petition for a Writ of Certiorari should be denied.

STATUTORY PROVISIONS INVOLVED

A. *28 U.S.C. § 1291* (set forth in Petition for a Writ of Certiorari at 3).

B. *The Comprehensive Environmental Response, Compensation and Liability Act of 1988 ("CERCLA"), 42 U.S.C. § 9607(f), CERCLA § 107(f)* (set forth in full in Appendix A).

STATEMENT OF THE CASE

A. Procedural Background

Both Petitioner, State of Utah, as the State CERCLA Trustee designated to act on behalf of the public as trustee of the damaged natural resources, and Petitioner, Kennecott Corporation, sought review by the court below of an order of the federal district court denying a motion to approve and enter a consent decree submitted by the parties. The proposal would have settled the public's claim against Kennecott for natural resource damages under CERCLA § 107(f), 42 U.S.C. § 9607(f).

Utah and Kennecott each filed separate appeals, which were subsequently consolidated, arguing that refusal to enter the proposed consent decree was appealable as a final collateral order under 28 U.S.C. § 1291 because the district court's order (1) conclusively determined Utah's and Kennecott's right not to go to trial, (2) resolved the "important" issue of whether the district court applied an erroneous legal standard in considering entry of the proposed consent decree, and (3) because the order was effectively unreviewable on appeal from a final judgment.

Respondent, Salt Lake County Water Conservancy District ("District"), a political subdivision of the State of Utah and a permissive intervenor in the proceeding below, moved to dismiss the consolidated appeals for lack of jurisdiction. The motion was

granted by the Tenth Circuit, and the Petition for Certiorari followed.

B. The District Court's Review and Denial of Entry of the Proposed Consent Decree.

In 1986, Utah, as Trustee, filed CERCLA natural resource damage claims against Kennecott for contamination of ground and surface water in Salt Lake County resulting from Kennecott's and their predecessor corporations' operation of the Bingham Copper Mine in the Salt Lake Valley. The Complaint claimed damages in the approximate amount of $129 million based on the quantity of groundwater believed to be contaminated. *See Utah v. Kennecott,* 801 F. Supp. 553 (D. Utah 1992); Petition for a Writ of Certiorari ("Petition"), at 3B.[1] Kennecott initially offered to settle the claims for assignment of water rights and performance of remediation work valued in excess of $100 million. *Id.* at 4B. Utah rejected this offer on the ground that Utah could not conclude that the settlement would satisfy all public concerns. *Id.* at 3A, 11B.

Following the subsequent negotiations, on July 30, 1991, Utah and Kennecott filed a consent decree with the district court proposing to settle the natural resource damage claim for $11.7 million, plus three hundred thousand dollars for attorney's fees in exchange for a release and covenant not to sue Kennecott for CERCLA response costs or for damages to surface and groundwater in a defined "mining impact area." *Id.* at 14B.

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1. The opinions below are included in the Appendix to the Petition for a Writ of Certiorari. The opinion of the Tenth Circuit, *Utah v. Kennecott,* 14 F.3d 1489 (10th Cir. 1994), is included as Appendix A and the Memorandum Decision and Order of the District Court, *Utah v. Kennecott,* 801 F. Supp. 553 (D. Utah 1992), is included as Appendix B. For the convenience of the Court, this brief contains cites to the pages of the Petition's Appendix when referring to these cases.

The District moved to intervene as a matter of right pursuant to CERCLA § 133(i), 42 U.S.C. § 9633, and opposed entry of the proposed settlement on the ground that it was not consistent with the requirements of CERCLA. After a period of public comment, the district court held a hearing on Petitioners' Motion for Entry of the proposed decree. At the hearing, Petitioners failed to give the court any basis for the settlement and argued that absent evidence of collusion or bad faith the court was required to accept the proposed consent decree. *Utah v. Kennecott,* Case No. C86-902 (D. Utah), Portions of Transcript of October 25, 1991 Hearing (attached hereto as Appendix B) at 4a-8a.

Recognizing its duty to determine whether the proposed consent decree was fair, just and consistent with the statutory mandate, the trial court declined to approve the settlement and ordered an evidentiary hearing to determine the sufficiency of the proposed settlement. The court also granted the District permissive intervention for the purpose of participating in discovery and the evidentiary hearing. Petition at 14B-17B; Transcript of Hearing at 1033.

After six days of hearing, the district court entered its Memorandum Decision and Order ("Order"), concluding that "the proposed Consent Decree as written is not just and fair or consistent with the purposes of CERCLA." *Utah v. Kennecott Corp.,* 801 F. Supp. 553, 572 (D. Utah 1992); Petition at 45B. Accordingly, the court denied approval of the proposed consent decree, and granted the District permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. *Id.* Instead of attending a scheduled case management conference, both Utah and Kennecott appealed.

C. The Tenth Circuit Found that the Order is Not Immediately Appealable Pursuant to § 1291.

Petitioners contended that jurisdiction in the Tenth Circuit was proper (1) under the collateral order exception to § 1291, (2) pursuant to the pragmatic finality doctrine of the Tenth Circuit, and (3) because the Order had the practical effect of granting or denying injunctive relief appealable pursuant to § 1291(a)(1). The Tenth Circuit held that the trial court's denial of the proposed consent decree did not satisfy any of the alleged grounds for appellate review and granted the District's motion to dismiss for lack of jurisdiction.[2] *Utah v. Kennecott,* 14 F.3d at 1495-97; Petition at 14A-18A.

In examining the right of immediate appellate review in light of the *Cohen* test, the Tenth Circuit found (1) that the district court's order is not final and does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness, to seek reconsideration of the proposed decree, or to litigate the issues on the merits and (2) that Utah and Kennecott could not point to a right of review under CERCLA or any other statutory or constitutional ground that would require immediate appellate review of a denied consent decree. *Utah v. Kennecott,* 14 F.3d at 1493-94, Petition at 9A-10A, 12A.

In their Petition for a Writ of Certiorari, Utah and Kennecott now urge that an unidentified CERCLA provision "which explicitly favors minimizing litigation" creates the necessary "explicit statutory right" to satisfy the "important question" prong of the *Cohen* test. Petitioners argue that this amorphic provision creates a statutory right of a government trustee to settle a natural

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2. In their Petition for a Writ of Certiorari, Petitioners only seek to review the circuit court's denial of jurisdiction pursuant to the collateral order exception to § 1291.

resource damage claim on its own terms to avoid trial.[3]

SUMMARY OF ARGUMENT

A. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994), Is Controlling of This Petition. Consistent with That Opinion, This Court Should Deny Petitioners' Request for a Writ of Certiorari.

This court recently held in *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994) ("*Digital Equipment*"), "that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders" immediately appealable pursuant to § 1291 of the Judicial Code. *Id.* at 1994. This is precisely the issue presented by the present Petition for Certiorari.

The Petition seeks review of the district court's refusal to approve a settlement agreement between Utah and Kennecott and enter a proposed consent decree after the court found that there was not a sufficient factual foundation from which it could find that the proposed decree was fair and consistent with the purposes that CERCLA is intended to serve.

Petitioners state that "[i]f denial of this settlement is not reviewed immediately, then the CERCLA Trustee's right to bring and settle this claim will be infringed with no opportunity to redress." Petition at 22. This argument is nothing more than another version of the "right not to be tried" argument that was expressly rejected by this Court in *Digital Equipment*. As this

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3. Petitioners do not cite to a statutory provision that grants a government trustee the right to obtain a consent decree settling a natural resource damage claim on its own terms. In fact, Petitioners have not included in the "Pertinent Statutory Provision" section of their Petition any CERCLA statutory authority. Petitioners only reference 28 U.S.C. § 1291.

Court has made clear, the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity, simply "does not rise to the level of importance needed for recognition under § 1291." *Id.* at 2001.

B. The Petition Fails to Qualify Under the Collateral Order Exception to the Finality Rule as Enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1941), and Its Progeny.

1. Certiorari Should Be Denied Because The Petition Fails To Identify An "Important" Explicit Statutory Or Constitutional Right That Would Supply The Basis For A Collateral Order Appeal.

In *Digital Equipment,* this Court suggested that nonfinal orders may be immediately appealable where important "statutory and constitutional rights" are irretrievably lost. *Id.* at 2002. However, this Court also explained that the right to be trial-free obtained through a settlement agreement does not rise to the level of importance needed to supply a basis for interlocutory appeal under § 1291. *Id.* at 2001.

In an effort to circumvent the express holding of *Digital Equipment,* Petitioners argue that because one of the parties to the proposed consent decree was a trustee appointed pursuant to CERCLA with authority to seek damages for injury to natural resources, the trustee has "explicit statutory authority" to settle which falls within the narrow exception to the finality rule of § 1291.

CERCLA, like many other federal statutes, provides for a trustee and places in that trustee the responsibility to pursue claims for damages. *See* CERCLA § 107(f), 42 U.S.C. § 9607(f).

CERCLA, however, does not provide and Petitioners have not pointed to an "explicit statutory right or guarantee" which was denied by the trial court's refusal to enter the proposed decree. CERCLA's grant of authority to a natural resource trustee is contained in § 107(f), which provides only that a natural resource trustee may assess damages to natural resources and "shall act on behalf of the public as trustee of such natural resources to recover for such damages." CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1). Other than this provision, CERCLA grants no authority to a natural resource trustee to bring, try or settle claims for natural resource damages.

Authority conferred by CERCLA on a trustee to "recover for such damages" may, by implication, give that trustee authority to file lawsuits, manage litigation and even enter into settlement agreements. However, this implied authority does not create an "explicit statutory right" to settle those claims on the trustee's proposed terms. In fact, the legislative history of CERCLA clearly indicates that Congress expressly intended that CERCLA settlements be subject to challenge and reviewable by federal district courts to insure that settlements would be fair and just to the public and consistent with the purposes of CERCLA.

The right to immunity from trial that Petitioners argue is present in this case must be "explicit" in the statute, not just implicit from a general policy of CERCLA to encourage settlement or the general public policy favoring settlement that is implicit in all litigation, including CERCLA claims. *See Digital Equipment,* 114 S. Ct. at 2002 (This Court was not swayed by what it characterized as Digital's "last-ditch effort" to come within *Cohen's* sense of importance by trying to show that settlements merit collateral order treatment "because they advance the public policy favoring voluntary resolution of disputes.").

2. The District Court's Order Did Not Resolve an Important Issue Completely Separate from the Merits of the Action.

To meet the second prong of *Cohen,* the "important question" must also be "completely separate from the merits of the action." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978). The issue raised by Petitioners of whether a trustee has a right to settle a natural resource damages claim is inextricably enmeshed with the merits of the litigation — whether the trustee's proposed consent decree is just, fair and consistent with CERCLA.

3. Denial of Entry of a Consent Decree Does Not Conclusively Determine the Parties' Ability to Settle Their Claims.

To satisfy the first prong of the *Cohen* test the district court's denial of the consent decree must conclusively determine the parties' abilities to settle their claims. Orders that are inherently tentative "to which some revision might reasonably be expected in the ordinary course of litigation" do not meet this requirement.

The district court's order denying effect to a proposed consent decree is inherently tentative. The district court determined only that approval of the consent decree required further study and factual support. The Order did not contain any limitations on the court's ability to reconsider future proposals. It does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness. *Utah v. Kennecott Corp.,* 14 F.3d at 1494; Petition at 9A-10A.

4. A Right to Settle and Not to Proceed with Litigation Is Not an Important Right Effectively Unreviewable on Appeal after Judgment.

Any rights of Utah and Kennecott under their settlement agreement can be adequately vindicated on appeal from a final

judgment. *See Digital Equipment,* 114 S. Ct. at 1996 ("rights under private settlement agreements can be adequately vindicated on appeal from final judgment.").

C. The Petition Does Not Present an Issue in Conflict Among the Courts of Appeals. The Courts Are in Agreement that a District Court's Refusal to Approve a Proposed Settlement Agreement Is Not Appealable Under 28 U.S.C. § 1291.

This Petition involves the immediate appealability of a district court's refusal to enter a *proposed* settlement agreement. Petitioners cite to no authority conflicting with the Tenth Circuit's opinion denying § 1291 appealability to the denial of entry of a *proposed* settlement agreement. Courts of Appeals have consistently denied appellate jurisdiction to review the denial of entry of a proposed settlement agreement because review requires inquiry into the merits of the case.

In suggesting a conflict among the circuit courts, Petitioners cite to cases involving refusal to enforce *pre-existing* settlement agreements. Review of an order denying enforceability of a pre-existing settlement does not require an inquiry into the merits of the case. As noted by Petitioners, prior to *Digital Equipment* courts of appeals sometimes did find § 1291 jurisdiction to review a district court's refusal to enforce a pre-existing settlement agreement. However, whatever jurisdictional distinction may have existed between these two lines of cases was resolved by the Supreme Court in *Digital Equipment* which "granted certiorari to resolve this conflict." *Digital Equipment* at 1995.

In *Digital Equipment,* the Supreme Court held that even in the second line of cases, appellate jurisdiction was not available under § 1291. "We hold that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." *Id.* at 1994.

D. Petitioners Have Improperly Raised an Issue in the Petition for Certiorari that Was Not Presented Below.

This Court has made clear that, although not precluded from doing so, the Court will "not normally decide issues not presented below." *Carlson v. Green*, 446 U.S. 14, 17 (1980). In their Petition for a Writ of Certiorari, Utah and Kennecott ask this Court to consider whether a CERCLA Trustee has a statutory right to settle claims on its own terms and whether this right, if it exists, is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. Petitioner's Brief at 9. This is an issue that the Petitioners did not raise before the Tenth Circuit.

In its brief regarding appellate jurisdiction filed in the court below, Petitioners argued that the central issue in the appeal which allegedly satisfied the "important" requirement of *Cohen* was "the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court." This Court found such a claim "patently irrelevant for § 1291 purposes." *Digital Equipment*, 114 S. Ct. at 2000 n. 6.

Petitioners did not argue to the Tenth Circuit that a natural resource trustee has a "statutory" right to settle natural resource claims on its own terms and that the denial of such a right, if it exists, is "important" under *Cohen*. Consequently, this Court should refuse to now consider this issue on the Writ of Certiorari.

MISSTATEMENTS OF FACT OR LAW SET FORTH IN THE PETITION

1. Petitioners erroneously state that CERCLA provides natural resource trustees with explicit statutory authority to settle claims. *See* Petition at 8 (CERCLA trustee has a right "to bring and settle a claim for natural resource damages."); *Id.* at 10 (natural resource trustee has "exclusive and plenary power to bring, assess,

try and settle claims."); *Id.* (referring to "Trustee's statutory right to settle a natural resource damage claim under CERCLA. . . .") *Id.* at 18 (claiming that the district court interfered with "the CERCLA Trustee's statutory authority to settle this claim."); *Id.* at 21 (referring to "CERCLA Trustee's right to bring and settle a claim for natural resource damages. . . .").

In reality, the only statutory authority granted a natural resource trustee under CERCLA is authority "to assess damages" and "to recover for such damages." CERCLA § 107(f)(1), (2)(B), 42 U.S.C. § 9607(f)(1), (2)(B). Nowhere does CERCLA grant a trustee "exclusive and plenary" authority to "settle" claims for natural resource damages. Petitioners have not and cannot cite to any such statutory authority.

In fact, to settle a natural resource damages claim, a natural resource trustee is required to obtain a consent decree from a district court that has the duty to determine whether the consent decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990).

2. Petitioners misstate the holding of this Court in *Digital Equipment* by suggesting that the holding in that case applied only to private settlement agreements. While it is true that the settlement agreement at issue in *Digital Equipment* was a "private" settlement agreement, the explicit language of this Court's holdings in that case clearly applied to settlement agreements *in general,* including consent decrees, and was not restricted to private settlement agreements. *See, e.g., Digital Equipment,* 114 S. Ct. at 1194 ("We hold that an order denying effect *a settlement agreement* does not come within the narrow ambit of collateral orders") (emphasis added); *Id. at* 2004 ("We accordingly hold that a refusal to enforce *a settlement agreement* claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.") (emphasis added).

REASONS FOR DENYING THE WRIT

I.

DIGITAL EQUIPMENT CORP. V. DESKTOP DIRECT, INC., 114 S. Ct. 1992 (1994), IS CONTROLLING OF THIS PETITION. CONSISTENT WITH THAT OPINION, THIS COURT SHOULD DENY PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI.

This Court was recently faced with the same issue that is before the Court in the present Petition for a Writ of Certiorari: Whether a district court's refusal to give effect to a settlement agreement between two parties is immediately appealable under 28 U.S.C. § 1291. *See Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994). In *Digital Equipment*, Desktop Direct, Inc. ("Desktop") brought a complaint against Digital Equipment Corporation ("Digital") alleging the unlawful use of a trade name. The two parties subsequently entered into a settlement agreement following which Desktop filed a notice of dismissal.

Several months later, Desktop moved to vacate the dismissal and rescind the settlement agreement, alleging that Digital had made misrepresentations of material facts during settlement negotiations. The district court granted the motion to vacate the dismissal and Digital appealed to the Tenth Circuit. The Tenth Circuit dismissed the appeal for lack of jurisdiction, holding that the district court order was not immediately appealable under the collateral order doctrine. *Id.*, 114 S. Ct. at 1995.

Digital argued to this Court, as do the Petitioners in the present case, that refusal to give effect to a settlement agreement should be immediately appealable on the grounds that such refusal denies settling parties a privately negotiated "right not to be tried." *Id.* at 2001-02. This Court affirmed the Tenth Circuit's dismissal of the appeal, holding that "an order denying effect to a settlement

agreement does not come within the narrow ambit of collateral orders." *Id.* at 1994. This Court expressly dismissed the "right not to be tried" argument, characterizing it as a "losing argument" and holding "that a refusal to endorse a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291. *Id.* at 2002, 2004.

In their Petition, Utah and Kennecott seek review of the failure of the district court to give judicial effect to a settlement agreement between the parties by refusing to approve the agreement and enter a proposed consent decree. As required, the district court reviewed the proposed settlement and found that there was not a sufficient factual foundation from which it could find that the proposed decree was fair and just. In addition, the court did find that the proposed decree in two respects was inconsistent with the purpose and requirements of CERCLA. As a result, the district court could not and would not put its stamp of approval on the proposed consent decree and give effect to the settlement agreement.

Petitioners state that "[i]f denial of this settlement is not reviewed immediately, then the CERCLA Trustee's right to bring and settle this claim will be infringed with no opportunity to redress." Petition at 22. This argument is nothing more than another version of the "right not to be tried" argument that was expressly rejected by this Court in *Digital Equipment.* Recognizing "that Section 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye," this Court explained that there is only a narrow area where such a right may exist, *i.e.*, where there is an "explicit statutory or constitutional guarantee that trial will not occur."[4] *Id.* at 1999. *See*

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4. Very few rights to terminate litigation have been recognized by the Court as sufficiently "important" to support § 1291 appealability. *See, e.g., Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (state's Eleventh Amendment immunity from suit in federal court); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denying government qualified

(Cont'd)

also, Lauro Lines S.R.L. v. Chaser, 490 U.S. 495, 503 (1989) (Scalia J. concurring) (A right not to be tried even if unretrievable, must be sufficiently important to overcome the policies militating against the interlocutory appeals). This Court then went on to explain that the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity, simply "does not rise to the level of importance needed for recognition under § 1291." *Digital Equipment,* 114 S. Ct. at 2001.

Petitioners attempt to distinguish the present case from *Digital Equipment,* arguing that *Digital Equipment* applies only to "private settlement agreements." While it is true that the settlement agreement at issue in *Digital Equipment* was a "private" settlement agreement, this Court's holdings in that case clearly applied to settlement agreements *in general,* including consent decrees, and was not restricted to private settlement agreements. *See. e.g., Digital Equipment,* 114 S. Ct. at 1194 ("We hold that an order denying effect *to a settlement agreement* does not come within the narrow ambit of collateral orders") (emphasis added); *Id.* at 2004 ("We accordingly hold that a refusal to enforce *a settlement agreement* claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.") (emphasis added).

Digital Equipment is controlling of this Petition. Under this Court's clear rulings in that case, the district court's refusal to enter the settlement agreement between Utah and Kennecott is not immediately appealable under § 1291.

(Cont'd)
immunity from damage suit); *Nixon v. Fitzgerald,* 457 U.S. 731 (1982) (order denying President absolute immunity from suit for civil damages arising from actions taken while President of the United States); *Abney v. United States,* 431 U.S. 651 (1977) (adverse ruling on a Fifth Amendment double jeopardy claim).

II.

THE PETITION FAILS TO QUALIFY UNDER THE COLLATERAL ORDER EXCEPTION TO THE FINALITY RULE AS ENUNCIATED IN *COHEN V. BENEFICIAL INDUSTRIAL LOAN CORP.*, 337 U.S. 541 (1941), AND ITS PROGENY.

Section 1291 of the Judicial Code confines appeals of right to those from "final decisions of the District Courts." 28 U.S.C. § 1291. For a ruling to be final, it must "end[] the litigation on the merits and leave nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). Further, "the judge must clearly declar[e] his intention in this respect." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 274 (1991). Denial of entry of a consent decree does not meet the finality requirement. Indeed such an order insures that the litigation will continue. *See Gulfstream Aerospace*, 485 U.S. at 275.

This Court, beginning in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541(1949), recognized a "small class of decisions that are appealable under Section 1291 even though they do not terminate the underlying litigation." This "practical construction" of the Rule entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945), but also to appeal from a narrow class of decisions that must, in the interest of "achieving a healthy legal system" be treated as final. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995 (1994). This Court has "repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has

been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Id.* at 1996 (citations omitted).

The issue of appealability under § 1291 of this "narrow" class of decisions "should not, and cannot, depend on a party's agility in so characterizing the right asserted," *Id.* at 1998, and "is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded or a 'particular injustice' averted by a prompt appellate court decision." *Id.* at 1996.

This "narrow class" of decisions comprises only those district court decisions (1) that are conclusive, (2) that resolve important questions completely separate from the merits, and (3) that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. *Id.* at 1995-96 (*citing Coopers & Lybrand,* 437 U.S. 463, 468 (1978)). The conditions for collateral order appeal are "stringent" and unless all three criteria are met, jurisdiction is not available under the collateral order doctrine. *Digital Equipment,* 114 S. Ct. at 1996; *Gulfstream Aerospace,* 485 U.S. at 276.

The Order of the district court finding the proposed consent decree in this case deficient and not just, fair or consistent with the mandates of CERCLA, does not meet any of the prongs of the test for interlocutory appealability.

A. Certiorari Should Be Denied Because the Petition Fails to Identify an "Important" Explicit Statutory or Constitutional Right that Would Supply the Basis of a Collateral Order Appeal.

In *Digital Equipment,* this Court explained that

> Where statutory and constitutional rights are concerned, "irretrievabl[e] los[s]" can hardly

> be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principal of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law. . . .

Digital Equipment, 114 S . Ct. at 2002.

This Court then made clear that the right to be trial-free obtained through a settlement agreement, as contrasted with a right grounded on an explicit, statutory or constitutional guarantee of immunity from trial, simply "does not rise to the level of importance needed for recognition under § 1291." *Id.* at 2001.

In their Petition for a Writ of Certiorari, Utah and Kennecott attempt to circumvent this Court's ruling in *Digital Equipment* by arguing that a CERCLA Trustee has an "explicit statutory right" to settle claims on its own terms and that this right is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. *See* Petitioner's Brief at 9-10.[5] There is no such right "explicit" or even "implicit" in CERCLA.

CERCLA, as its name implies, is a comprehensive environmental liability act which provides for response to and cleanup of a release or threatened release of hazardous substances

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5. In the court below the Petitioners argued that the "important" issue that satisfied the *Cohen* test was whether the district court applied the proper legal standard in reviewing the consent decree. The fact that the Petitioners had the option to move pursuant to § 1292 (b) of Title 28 to have the district court certify the standard of review of a CERCLA consent decree by a district court judge, yet sought no such certification, undercuts their argument that this issue is an "important" issue justifying interlocutory appeal. In any event, this Court has made clear that whether the district court applied the wrong legal standard, is "patently irrelevant for Section 1291 purposes." *Digital Equipment,* 114 S. Ct. at 2000, n.6. Moreover, the court did not apply the wrong standard.

and for compensation for damage to natural resources. The claim asserted in the district court was a claim for damages to natural resources pursuant to CERCLA § 107(f), 42 U.S.C. § 9607(f). Under CERCLA, the natural resource damage trustee does not have authority to seek remediation or removal action pursuant to CERCLA, but only the authority to perform those acts as set forth in § 107(f).

This section provides that the governor of each state shall designate state officials who may act on behalf of the public as trustees for natural resources and shall assess the amount of damage to natural resources for the purpose of seeking monetary recovery pursuant to this section. The only explicit statutory authority granted the trustee is authority "to assess damages" and "to recover for such damages." CERCLA § 107(f)(1), (2)(B), 42 U.S.C. § 9607(f)(1), (2)(B).

Other provisions of CERCLA relating to the release or threatened release of hazardous substances provide for and encourage immediate action to remove the source of contamination and to remediate or clean up and restore the area contaminated. In this regard the President is given authority to enter into agreements to facilitate the speedy abatement of an actual or threatened release to prevent the contamination. 42 U.S.C. § 9622. However, none of these provisions apply to the authority of a state natural resource trustee.

There is nothing in CERCLA or in any other statutory or constitutional provision which grants a natural resource trustee a right to settle a claim for natural resource damages on its own terms without review by the district court. To the contrary, as contrasted with private parties who may settle their disputes on any terms which they feel reasonable, a natural resource trustee that seeks and is required by CERCLA to obtain a consent decree from a district court, can only settle if the court finds that the proposed

consent decree is "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve."[6] *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) (stating that the trial court's function when reviewing proposed consent decrees under CERCLA is to "satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve.") (citing H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 3038, 3042)). A consent decree that affects the public interest or third parties imposes a heightened responsibility on the courts to protect those interests. This requirement is intended to protect those who did not participate in negotiating in the compromise, not those who negotiated it.

Indeed, Petitioners cite to no provision of CERCLA conferring such a right. For authority supporting the proposition that "CERCLA explicitly encourages settlement of claims," Petitioners cite to CERCLA § 122(a), 42 U.S.C. § 9622(a), a section that does not even apply to natural resource trustees.[7]

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6. Even the rebuttable presumption provided by CERCLA § 107(f) is not available to the state trustee in this case. Subsection (2)(C) of § 107(f), provides that there shall be "a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter" when the state trustee determines damages "in accordance with the regulations promulgated under Section 9651(c). . . ." In providing this "presumption," CERCLA clearly acknowledges that there will be judicial review of any trustee determination and that the best a trustee can be afforded is a "rebuttable presumption." In this case, however, the rebuttable presumption is not available to the trustee because he chose not to follow regulations promulgated under § 9651(c). *See* Petition at 33B (District Court's Memorandum Decision and Order).

7. The provision referenced by Petitioners in § 122(a) provides "whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation."

Aside from the fact that this section does not apply to a natural resource trustee, this section does not guarantee a right to settle even to the President to whom it does apply. At best, it only "encourages" settlements. *See* Petition at 15.

Petitioners cite to three cases as support for their proposition that CERCLA's primary goal to encourage early settlement confers on a natural resource trustee a statutory "right" to settle. *United States v. Montrose Chemical Corp.*, 827 F. Supp. 1453 (C.D. Cal. 1993); *In re Achushnet River & New Bedford Harbor,* 712 F. Supp. 1019 (D. Mass. 1989); and *New York v. Exxon Corp.*, 697 F. Supp. 677 (S.D.N.Y. 1988). Petition at 15 n.15-16. It is true that these cases each express the policy favoring settlement of disputes. However, these cases each explain that before the district court may approve a proposed consent decree, the court must scrutinize the adequacy of the settlement. *See Montrose Chemical,* 827 F. Supp. at 1458 ("Before initially approving the Proposed Decree in accordance with CERCLA, this Court must satisfy itself that the settlement is fair, reasonable, and consistent with the purposes of CERCLA."); *In Re Achushnet River,* 712 F. Supp. at 1027 ("A multiplicity of factors are considered in evaluating whether the Proposed Decree before this Court is fair and reasonable. The protection of the public interest is paramount."); *New York v. Exxon,* 697 F. Supp. at 692 ("The question then is not whether the Court disregarded any bright line procedural rules governing CERCLA settlements — there are none — but whether the procedures chosen provide the Court with sufficient information to intelligently evaluate the settlement. . . . Before approving a CERCLA settlement, the Court must be convinced that it is fair, adequate, and reasonable, and consistent with the Constitution and mandate of Congress. ").

This requirement of judicial review and approval of proposed settlements was expressed by Congress in enacting CERCLA § 122, the very section that Petitioners rely on for their claimed explicit right to settle. Recognizing that judicial examination and

approval of the settlement is necessary to protect against improper or "bad faith" settlements, the House Judiciary Committee explained that "[b]efore initially approving a consent decree under CERCLA, a court must satisfy itself that the settlement is reasonable, fair and consistent with the purposes CERCLA is intended to serve." H.R. Rep. No. 253 (III), 99th Cong., 2d. Sess., *reprinted in*, 1986 U.S. Code Cong. & Admin. News 2835, at 3038, 3042. The emphasis on settlement was not absolute. It was the intention of Congress to require active judicial involvement. "In order to accomplish this goal of review, all agreements regarding clean-up must therefore be couched in terms of a consent decree under Section 106 because this is the only section where a settlement agreement can be revised and enforced by a court." *Id.* at 2883.

Certainly Congress did not believe that § 122, the only section Petitioners refer to in support of their claimed "explicit statutory right," conferred a right on anyone (certainly not a natural resource trustee) to settle on their own terms. Congress provided that CERCLA settlements would be challenged and reviewed and only accepted if a district court found them fair and just to the public and consistent with the Congressional mandate.

> Finally, the Section provides that all issues and matters in the voluntary settlement are subject to challenge and reviewable by the Federal District Court in the consent decree process except the Administrator's determination to reimburse parties from the fund. This legislation preserves all rights of any person under existing law, including the right to file suit, the right to intervene and to be a party in the case.

Id. at 2885.

CERCLA requires that a court examine and approve a proposed consent decree. Nothing in CERCLA, either "implicit" or "explicit," grants a right to a natural resource trustee to settle damage claims on its own terms.

B. The District Court's Order Did Not Resolve an Important Issue Completely Separate from the Merits of the Action.

In addition to requiring an "important issue," the second prong of the *Cohen* test requires that the issue being raised on appeal be "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. The issue raised by Petitioners of whether a trustee has the unfettered explicit statutory right to settle a natural resource claim goes to the very heart of the litigation — whether the trustee's proposed consent decree is just, fair and consistent with CERCLA.

CERCLA clearly requires a reviewing court to determine a natural resource trustee's right to settle in light of the factual basis of the claim and whether it is fair and just in light of those facts and the purposes of CERCLA. This determination is enmeshed in the factual and legal issues comprising the Petitioners' causes of action. In fact, in their docketing statements to the Tenth Circuit, Petitioners' acknowledge that the issues raised on appeal included whether the district court erred in making certain findings of fact with regard to the sufficiency of the factual basis of the proposed settlement. *See* Portions of Docketing Statements Filed by Petitioners with the Tenth Circuit (attached hereto as Appendix C). Because the issues on appeal involve considerations that are inextricably intertwined with the factual issues going to the merits of the case, the issues on appeal are not appealable under the collateral order doctrine. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).

C. Denial of Entry of a Consent Decree Does Not Conclusively Determine the Parties' Ability to Settle Their Claims.

To satisfy the first prong of the *Cohen* test the district court's denial of the consent decree must conclusively determine the parties' abilities to settle their claims. Orders that are "inherently tentative," that is, when "a district court ordinarily would expect to reassess and revise such an order 'in the ordinary course of litigation,' " do not meet this requirement. *Gulfstream*, 485 U.S. at 277-278; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 260 U.S. 1, 12-13 n.14 (1983).

The district court's Order denying effect to a proposed consent decree is inherently tentative. The district court did not "necessarily contemplate" that the decision will close the matter for all time. In denying the motion, the district court determined only that it should await further study and support. It does no more than permit Petitioners to propose a new consent decree within the bounds of substantive fairness. *Utah v. Kennecott Corp.*, 14 F.3d at 1494, Petition at 9A-10A. The court may also reconsider the rejected proposal upon a proper foundational basis. As the Tenth Circuit pointed out, Utah and Kennecott "are free to continue with renewed settlement efforts and further proceedings to secure court approval. Although the trial court concluded that Utah and Kennecott had not met their burden of substantive fairness under CERCLA, the trial court did not foreclose future proposed consent decrees." *Utah v. Kennecott Corp.*, 14 F.3d at 1493; Petition at 8A. Because the denial was not made with the expectation that it will be the final word on the trustee's ability to settle, it is not a conclusive determination within the meaning of the collateral order doctrine.

D. A Right to Settle and Not to Proceed with Litigation Is Not an Important Right Effectively Unreviewable on Appeal after Judgment.

Utah and Kennecott also argue that, since they lost the right to

settle on the specific terms of the proposed consent decree, they lost an important right that cannot be vindicated effectively after the trial has concluded. This Court, in *Digital Equipment,* concluded that, contrary to Petitioners' argument, "rights under private settlement agreements can be adequately vindicated on appeal from final judgment." *Digital Equipment,* 114 S. Ct. at 1996.

If immediate appellate review were allowed every time a trustee appointed pursuant to some statute was denied entry of a settlement agreement, "Congress' final decision rule would end up a pretty puny one and so the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third *Cohen* requirement." *Digital Equipment,* 114 S. Ct. at 1998. The order of the district court refusing to enter a consent decree on the grounds that the settlement is deficient, not just, fair or consistent with the mandates of CERCLA, does not meet the third prong of the *Cohen/Digital Equipment* test.

III.

THE PETITION DOES NOT PRESENT AN ISSUE IN CONFLICT AMONG THE COURTS OF APPEALS. THE COURTS ARE IN AGREEMENT THAT A DISTRICT COURT'S REFUSAL TO APPROVE A PROPOSED SETTLEMENT AGREEMENT IS NOT APPEALABLE UNDER 28 U. S. C. § 1291.

Petitioners argue that this Court should grant certiorari to resolve a conflict among circuit courts as to whether a district court's rejection of a settlement agreement is "conclusive" and thus immediately appealable under 28 U.S.C. § 1291. In examining the alleged conflict, it is important to note the distinction between cases involving a court's refusal to enter a *proposed* settlement agreement (as is the situation in the present

case) and cases involving a court's refusal to enforce a *pre-existing* settlement agreement.

With regard to the first line of cases, the circuit courts of appeals are in uniform agreement — a court's refusal to approve a proposed settlement agreement is not appealable under § 1291.[8] The only conflict that existed between the courts of appeals involved the second line of cases — cases involving a court's refusal to enforce an *existing* settlement agreement, a situation not at issue in the present case. The issue in this second group of cases

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8. *See Utah v. Kennecott*, 14 F.3d 1489 (10th Cir. 1994) (holding that denial by a district court of entry of a consent decree does not meet either the first or second prong of the *Cohen* test and is not appealable pursuant to § 1291); *E.E.O.C. v. Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987) (concluding that *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) had "explicitly resolved a conflict among the circuits concerning whether and pursuant to what statute an interlocutory order disapproving a consent decree was appealable." The Ninth Circuit thus disavowed its prior decision in *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), in which the court had held that a refusal to enter a consent decree was appealable under § 1291); *Donovan v. Robbins*, 752 F.2d 1170, 1172 (7th Cir. 1985) (stating in dicta that a "judge's action in refusing to approve the [consent] decree was not a final decision, appealable under 28 U.S.C. § 1291."); *New York v. Dairlea Cooperative, Inc.*, 698 F.2d 567, 570 n.10 (2d Cir. 1983) (stating in dicta that a judge's rejection of a proposed settlement agreement as neither adequate nor fair was "not appealable pursuant to 28 U.S.C. § 1291."); *Seigal v. Merrick*, 590 F.2d 35, 36 (2d Cir. 1978) (holding "that the refusal of the District Court to approve a settlement in a stockholder derivative action is not appealable under § 1291); *Carson v. American Brands, Inc.*, 606 F.2d 420, 423-24 (4th Cir. 1979) (approving of *Seigal* as an analogous case though dismissing on § 1292(a)(1) grounds), *rev'd on other grounds*, 450 U.S. 79 (1981)); *Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972) (holding that an order denying entry of a consent judgment is not appealable on the grounds that the order cannot be deemed collateral to the main action).

centered on whether the "right not to be tried" was a right the denial of which was immediately appealable.[9]

This Court expressly granted certiorari in *Desktop Direct* "to resolve this conflict" and did so by holding that "the right not to be tried" does not supply the basis for an immediate appeal under § 1291. *Digital Equipment*, 114 S. Ct. at 2004. Thus, this Court has conclusively resolved any conflict that may have existed with regard to the appealability of pretrial orders refusing to enforce preexisting settlement agreements.

The distinction between cases involving a court's refusal to enter a *proposed* settlement agreement and cases involving a court's refusal to enforce a *pre-existing* settlement agreement is perhaps best understood by examining what Petitioners perceive to be a conflict between two opinions from the Second Circuit, *Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) and *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989). In *Seigal*, the Second Circuit held that an order refusing to approve a *proposed* settlement in a stockholders' derivative action was not appealable under § 1291. In *Janneh*, the Court held that an order denying enforcement of a *pre-existing* settlement agreement was immediately appealable.

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9. *Compare Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993), *aff'd*, 114 S. Ct. 1992 (1994) (holding that a broad and unbounded "right not to be tried" is no grounds for immediate appeal) and *Transtech Industries, Inc. v. A & Z Septic Clean*, 5 F.3d 51, 55 (3d Cir. 1993) (following *Desktop Direct* in rejecting the "right not to be tried" as the basis for appealability under § 1291 and concluding "that the district court's denial of summary judgment and refusal to enforce a settlement is a collateral order not appealable under the Cohen exception.") *with Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir., *cert. denied*, 113 S. Ct. 412 (1992) (granting jurisdiction to review a denial of enforcement of a settlement on grounds of a right not to go to trial); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) (same); and *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989) (same), *cert. denied*, 498 U.S. 865 (1990).

In *Janneh,* the Second Circuit explained that the order regarding a preexisting settlement agreement "is quite distinct from that considered in *Seigal v. Merrick,*" in that the agreement in *Janneh* required no inquiry into the merits of the case. The only question in *Janneh* was whether the parties had reached a settlement. In *Seigal,* however, a decision whether to approve a proposed settlement required the court to examine the merits of the case by weighing "the sufficiency of the settlement." *Janneh,* 887 F.2d at 435 n.4. When factual issues such as sufficiency of settlement remain in dispute, interlocutory appeals are not authorized. *See also Chaput v. Unisys Corp.,* 964 F.2d 1299 (2d Cir. 1992) (explaining *Janneh*).

In the present case, as in *Seigal,* the District Court was not faced with the issue of whether a settlement had been reached between Utah and Kennecott. Rather, the Court was presented with the task of determining whether the proposed settlement agreement reached by Utah and Kennecott was "reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." Because factual issues concerning the sufficiency of the settlement agreement at issue in this case remain in dispute, the Tenth Circuit correctly held that the district court's refusal to approve the settlement is not immediately appealable. This decision is not in conflict with opinions of other courts of appeals or with the Supreme Court's opinion in *Digital Equipment.*

IV.

PETITIONERS HAVE IMPROPERLY RAISED AN ISSUE IN THE PETITION FOR CERTIORARI THAT WAS NOT PRESENTED BELOW.

This Court has made clear that, although not precluded from doing so, the Court will "not normally decide issues not presented below." *Carlson v. Green,* 446 U.S. 14, 17 (1980); *see also Air Courier Conference of American v. American Postal Workers*

Union, 498 U.S. 517, 522, 111 S. Ct. 913, 917 (1991) (refusing to consider issue not argued to either of the lower courts); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989) (declining to consider issue not argued to the Court of Appeals).

In their Petition for a Writ of Certiorari, Utah and Kennecott ask this Court to consider whether a CERCLA Trustee has a statutory or constitutional right to settle claims on its own terms and whether this right, if it exists, is "important" as that term is used in the *Cohen* test for determining interlocutory appealability. Petitioner's Brief at 9. This is an issue that the Petitioners did not raise before the Tenth Circuit Court of Appeals.

In their brief regarding appellate jurisdiction filed in the court below, Petitioners argued that the central issue in the appeal which allegedly satisfied the "important" requirement of *Cohen* was "the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court." *See* Joint Memorandum Brief of the State of Utah and Kennecott Corporation Regarding Appellate Jurisdiction (pertinent portions of which are attached as Appendix D), at 23a-24a. *See also*, Portions of Docketing Statements Filed by Petitioners with the Tenth Circuit (Appendix C), at 20a-21a (Petitioners list "Issues to Be Raised on Appeal" as (1) "Whether, in reviewing the Proposed Consent Decree, the District Court applied incorrect legal standards. . . ." and (2) Whether the District Court erred in making certain findings of fact with regard to the sufficiency of the factual basis of the proposed settlement). This Court has previously explained that an argument that interlocutory appealability can be based on a district court's applying the "wrong legal standard" must be rejected "as patently irrelevant for § 1291 purposes." *Digital Equipment*, 114 S. Ct. at 2000 n.6.

Petitioners did not argue to the Tenth Circuit that a natural

resource trustee has a "statutory" right to settle natural resource claims on its own terms and that the denial of such a right, if it exists, is "important" under *Cohen*. Consequently, this Court should refuse to now consider this issue on a Writ of Certiorari.

CONCLUSION

This Petition does not present a special or important issue for review. The law in this area has been recently clarified by this Court's Opinion in *Digital Equipment*. There is no need to reaffirm that opinion, the law is clear and any possible conflict among the courts of appeals was resolved by *Digital Equipment*. The Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — CERCLA § 107(f), 42 U.S.C. § 9607(f)

CERCLA § 107(f), 42 U.S.C. § 9607(f):

(f) Actions involving natural resources; maintenance, scope etc.

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under

this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

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(B) State

The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. Such State officials shall assess damages to natural resources for the purposes of this chapter and such section 1321 of Title 33 for those natural resources under their trusteeship.

(C) Rebuttable presumption

Any determination or assessment of damages to natural resources for the purposes of this chapter and section 1321 of Title 33 made by a Federal or State trustee in accordance with the regulations promulgated under section 9651(c) of this title shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this chapter or section 1321 of Title 33.

* * *

APPENDIX B — *UTAH V. KENNECOTT*, CASE NO. C86-902, PORTIONS OF TRANSCRIPT OF OCTOBER 25, 1991 HEARING (D. UTAH)

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. C86-902

STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH,

Plaintiff,

vs.

KENNECOTT CORPORATION,

Defendant.

Salt Lake City, Utah
Date: October 25, 1991
Time: 2:00 p.m.

REPORTER'S TRANSCRIPT

BEFORE: THE HONORABLE J. THOMAS GREENE

APPEARANCES OF COUNSEL:

For the Plaintiff: FRED G. NELSON, ESQ. and
DENICE CHANCELLOR, ESQ.

Appendix B

For the Defendant: JAMES LEE, ESQ.
DAVID TUNDERMANN, ESQ.
ROBERT LONERGAN, ESQ.,
RICHARD PIERCE, ESQ.,
DALLIN JENSEN, ESQ., and
DALE BUTLER, ESQ.

For the Intervenor: DOUGLAS PARRY, ESQ.
DALE F. GARDINER, ESQ. and
BLAKE ATKIN, ESQ.

For Utah Chapter Sierra Club: KENLEY W. BRUNSDALE, ESQ.

Court Reporter: REEVE M. BUTLER, RPR
Official Court Reporter
Rm. 224 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

* * *

[108] on that chart, and those assumptions are all before you, Your Honor.

The explanation of that process is in the administrative record. In fact, I'm reading from or my notes are pages 2 and 3 of Kennecott's response to the public comments.

THE COURT: And does — have you presented and is it before me how those assumptions are translated into 12 million dollars?

MR. TUNDERMANN: No, Your Honor.

THE COURT: Why didn't you say $24 million or $6 million?

MR. TUNDERMANN: We each had our bottom lines, Your Honor, and somewhere in the bargaining a deal was struck; that's what —

THE COURT: How can I tell whether what you have done is reasonable?

MR. TUNDERMANN: We have described to you our process.

THE COURT: Are you describing the process?

MR. TUNDERMANN: We have described the process. I believe, your Honor, under the cases, for the settlement to be approvable by the court, it needs to be fair and reasonable and consistent with the statute.

Fairness is measured by essentially a procedural [109] test where the parties are sufficiently adversarial, that the settlement they strike can be regarded as a fair one and if we come to you together and make that representation, I think we're entitled to a presumption that it is fair.

Reasonableness — and these cases are cited in our report, Your Honor. The Cannon Engineering case, the Vertac Chemical case, the Roman Haws case; the courts have said: In reviewing CERCLA consent decrees, courts defer to the judgment of the Environmental Enforcement Agency that negotiates the decree, since the agency has the expertise to determine whether a decree will help or hinder the effort.

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THE COURT: So really all I need to know is whether you people really believe that it's just and reasonable and fair, and you having said that, that's an adequate basis for the court to determine, yes, it must be fair and reasonable.

MR. TUNDERMANN: If you conclude, Your Honor —

THE COURT: Is that what you're saying to me?

MR. TUNDERMANN: I'm saying to you, if you believe our representations that we were adversarial and discussions were across the table at arm's length, if you believe our representations that we had sharply adverse interests and balanced a lot of complex competing factors to reach a resolution, and if you believe that the settlement is consistent with the statute, that's all you need to believe.

THE COURT: Well, I could approve any figure you [110] came up with then; that's all I need, just your statement that it's fair. I mean, you could have got by for $6 million.

MR. TUNDERMANN: Yes, we might have; that would have been a better deal for us and a less good deal for the state, but that's not where we wound up.

THE COURT: Because the state agreed to $12 million, you're saying that's the only necessary factual basis for the court to have, having satisfied itself that here are adversarial parties, they have bargained, they negotiated, they looked at all of the facts, they bargained and drove a hard bargain and that should be approved because they were adversary parties.

MR. TUNDERMANN: Absent evidence of collusion or bad faith, I think that's all Your Honor needs.

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THE COURT: I think you demonstrated in your papers that the court has no business trying to determine what the very best settlement could be; of trying to find out if there is a better possible settlement; that isn't the business of the court.

The business of the court is to determine whether the settlement that you've arrived at is just and fair and I'm a little troubled about the basis on which I'm asked to come to that.

I'll take the matter under advisement, all matter under advisement; court's in recess.

* * *

[111]

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH

COUNTY OF SALT LAKE

I, REEVE M. BUTLER, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on October 25, 1991, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 2 to 111 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 17th day of December, 1991.

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s/ Reeve M. Butler
REEVE M. BUTLER, RPR

APPENDIX C — PORTIONS OF DOCKETING STATEMENTS FILED WITH THE TENTH CIRCUIT BY PETITIONERS

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: *Utah v. Kennecott*

Court/Agency: *United States District Court for the District of Utah, Central Division*

Court/Agency Docket No.: *CV 86-0902G*

District Judge: *J. Thomas Greene*

Party or Parties filing Appeal/Petition: *Defendant Kennecott Corporation*

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. Appeal from District Court

1. Date notice of appeal filed: *October 2, 1992*

   a. Was a motion filed for an extension of time to file notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: *No*

   b. Is the United States or an officer or an agency thereof a party to this appeal? *No*

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2. Authority fixing time limit for filing notice of appeal: *Fed. R. App. P. 4 (a)(1)*

3. Date final judgment or order to be reviewed was filed and *entered* on district court docket sheet: *September 3, 1992*

   a. Does the judgment or order to be reviewed dispose of *all* claims by and against *all* parties? SEE Fed. R. Civ. P. 54(b). *No*

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ATTACHMENT TO DOCKETING STATEMENT
for the
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

Utah v. Kennecott Lower Docket No. 86-0902G

I. 3. c. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)?

Yes. The District Court refused to enter the consent decree in part because that decree did not order Kennecott to control potential sources of ground water contamination or to contain and manage the existing plume of contamination. Thus, the Court's Order has the practical affect of requiring an injunction as a condition of settlement and is therefore appealable under 28 U.S.C. § 1292(a)(1).

III. GIVE BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

This is an action for natural resource damages under section 107 of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") 42, U.S.C. § 9607. A complaint was filed on October 3, 1986 by the State of Utah, by and through the Utah Department of Health, against defendant Kennecott Corporation, alleging that Kennecott was responsible for damages to ground water resources under the trusteeship of the State of Utah within the meaning of CERCLA. Further proceedings were stayed pending completion of technical studies, and further stays were granted to allow settlement

negotiations to proceed. As a result of these stays, as of the filing of this Docketing Statement, Kennecott has not filed an answer to the complaint.

On July 30, 1991, a settlement was reached between the State of Utah, represented by the Director of the Utah Department of Environmental Quality, the individual designated by the Governor as the Trustee for natural resources pursuant to CERCLA § 9607(f)(2), and defendant Kennecott Corporation. The terms of the settlement were embodied in a proposed consent decree and released for public review and comment. The parties evaluated the comments received, modified the proposed consent decree to respond to comments, and on September 23, 1991, submitted a modified consent decree to the District Court for approval and entry. The District Court ordered a discovery period and evidentiary hearing on four issues related to the proposed consent decree and the status of a potential intervenor. That evidentiary hearing began on March 23, 1992 and lasted for six days. Closing arguments were heard on May 14, 1992. On September 3, 1992, the District Court entered an Order denying the request to approve and enter the Consent Decree, granting the motion to intervene, and directing the parties to submit a discovery plan. Defendant Kennecott appeals from the September 3, 1992 Order.

IV. ISSUES TO BE RAISED ON APPEAL.

A. Whether, in reviewing the Proposed Consent Decree, the District Court applied incorrect legal standards, including

1. applying a "preponderance of the evidence" standard;

2. refusing to accord any presumption of validity to the settlement agreed to by the parties; and

3. failing to consider other relevant factors relating to the litigation, including a comparison of the strengths of the plaintiff's case versus the amount of the settlement offer, the likely complexity, length and expense of the litigation, the opinion of competent counsel, the stage of the proceedings and the amount of discovery already undertaken at the time of settlement, and the potential benefits associated with immediate payment of damages in weighing the fairness and reasonableness of the settlement?

B. Whether the District Court erred by refusing to defer to the judgment of the Trustee (the Director of Utah's Department of Environmental Quality), and instead substituting the Court's judgment for the Trustee's on the following issues:

1. technical studies in support of the settlement were adequate;

2. restoration of the ground water aquifer through active treatment was not technically feasible;

3. source control and remediation of the aquifer were more appropriately addressed through in separate negotiations involving the federal Environmental

Protection Agency, rather than incorporated into the natural resource damages settlement;

4. nature and extent of damage to the ground water aquifer caused by Kennecott was properly measured by the settlement;

5. the value of the damaged ground water was properly measured; and

6. the amount of the settlement was reasonable?

C. Whether the District Court erred in rejecting the Proposed Consent Decree because the settlement did not include relief that the Trustee was not authorized by CERCLA to seek or require?

D. Whether the District Court properly stated the measure of damages under CERCLA?

E. Whether the District Court erred in: (1) refusing to approve the settlement as structured by the Trustee; and (2) not permitting the Trustee to settle, even though the Trustee assumed for purposes of the settlement — contrary to fact — that the use of all water within a specified area (the "Mining Impact Area") would be lost forever, and limited the release and covenant not to sue Kennecott *only* to any injury to natural resources within the Mining Impact Area?

F. Whether, if reviewed under the proper legal standards, with appropriate deference to the settlement of the parties and the Trustee's technical judgment, the

evidence before the District Court required the conclusion that the Proposed Consent Decree is fair, reasonable and consistent with the requirements of CERCLA?

VI. INDICATE WHETHER *ORAL ARGUMENT* IS DESIRED IN THIS APPEAL. IF SO, WHY IN YOUR OPINION SHOULD ARGUMENT BE HEARD?

Oral argument is desired. Oral argument on this appeal should be heard because CERCLA is a notoriously complicated statute and the standards governing judicial scrutiny of a CERCLA natural resource damages settlement have not been decided by the Tenth Circuit Court of Appeals or the United State Supreme Court. Appellant believes that oral argument will assist the Court in reviewing (1) the provisions of CERCLA applicable to the Order being appealed from; (2) the standard of review that the District Court should have applied to the Proposed Consent Decree; and (3) the terms of the Proposed Consent Decree.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: *STATE OF UTAH V. KENNECOTT*

Court/Agency: *UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION*

Court/Agency Docket No.: *CV 86-0902G*

District Judge: *J. THOMAS GREENE*

Party or Parties filing Appeal/Petition: *PLAINTIFF STATE OF UTAH*

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. Appeal from District Court

1. Date notice of appeal filed: *OCTOBER 16, 1992*

   a. Was a motion filed for an extension of time to file notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: *NO*

   b. Is the United States or an officer or an agency thereof a party to this appeal? *NO*

2. Authority fixing time limit for filing notice of appeal: *Fed. R. App. P. 4 (a)(3)*

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3. Date final judgment or order to be reviewed was filed and *entered* on district court docket sheet: *SEPTEMBER 3, 1992*

   a. Does the judgment or order to be reviewed dispose of *all* claims by and against *all* parties? SEE Fed. R. Civ. P. 54(b). *NO*

Appendix C

ATTACHMENT TO DOCKETING STATEMENT
for the
UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

UTAH V. KENNECOTT LOWER DOCKET NO. 86-0902G

III. GIVE BRIEF DESCRIPTION OF NATURE OF ACTION AND RESULT BELOW.

The State filed this action for natural resource damages under section 107 of the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607. A complaint was filed on October 3, 1986 against defendant Kennecott Corporation, alleging that Kennecott was responsible for damages to surface and ground water resources. The proceedings were stayed pending completion of a 5-year study to define the nature and extent of the contamination.

On July 30, 1991, a proposed settlement was filed with the District Court and made available for public review and comment. The State and Kennecott evaluated the comments received, modified the proposed consent decree to respond to comments, and on September 23, 1991, submitted a Modified Consent Decree to the District Court for approval and entry. The Salt Lake Water Conservancy District moved to intervene opposing entry of the Modified Consent Decree. The District Court ordered a discovery period and evidentiary hearing on the proposed consent decree and intervention request. An evidentiary hearing began on March 23, 1992 and lasted for six days. Closing arguments were heard on May 14, 1992. On September 3,

1992, the District Court entered a Memorandum Decision and Order denying the request to approve and enter the Modified Consent Decree and allowed permissive intervention by the Water Conservancy District. Defendant Kennecott appealed from the September 3, 1992 Order (Appeal No. 92-4173). The District filed a cross-appeal. The State of Utah has also now filed an appeal from the Order.

IV. ISSUES TO BE RAISED ON APPEAL

A. Did the District Court use the correct standard of review and consider the relevant factors in making the determination that the Modified Consent Decree was not fair and reasonable and consistent with the provisions of CERCLA?

B. Did the District Court err by not giving deference to the conclusions of the State Trustee appointed under § 107 (f) of CERCLA, on the technical studies that support the settlement, specifically on the nature and extent of the contamination, the feasibility of restoration, and the value of the injury to the resource.

C. Did the District Court err in concluding that the State Trustee did not use a valuation method for injury to natural resources which was consistent with CERCLA?

D. Did the District Court err in concluding that a Decree settling a State Trustee's claim for natural resource damage must contain requirements for remedial measures to be consistent with CERCLA?

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E. Did the District Court err in making findings which did not recognize the limitation in the scope of the Modified Consent Decree as a settlement of only claims for injury to groundwater and surface water within the Mining Impact Area?

APPENDIX D — PORTIONS OF JOINT MEMORANDUM BRIEF OF THE STATE OF UTAH AND KENNECOTT CORPORATION REGARDING APPELLATE JURISDICTION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 92-4173
92-4179
92-4180

THE STATE OF UTAH, BY AND THROUGH THE UTAH STATE DEPARTMENT OF HEALTH,

Plaintiff-Appellant,

vs.

KENNECOTT CORPORATION,

Defendant-Appellant,

SALT LAKE COUNTY WATER CONSERVANCY DISTRICT,

Intervenor-Appellee.

On Appeal from the United States District Court
District of Utah, Central Division
Honorable J. Thomas Greene, Jr., District Judge
Civil No. 86-C-0902G

JOINT MEMORANDUM BRIEF OF THE STATE OF UTAH AND KENNECOTT CORPORATION REGARDING APPELLATE JURISDICTION AND JOINT RESPONSE TO THE SALT LAKE COUNTY WATER CONSERVANCY DISTRICT'S MOTIONS TO DISMISS FOR LACK OF JURISDICTION

Appendix D

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* * *

B. The Order Resolves An Important Issue Completely Separate From The Merits Of The Action

As explained above, the central issue in this appeal is the correct standard of review to be applied to a proposed settlement of a natural resource damages claim by a federal district court. That question is important — because it effectively determines a Trustee's ability to settle such a claim — and it is completely separate from the merits of the underlying claim. Accordingly, appellate review of the Order would not involve "considerations that are 'enmeshed in the factual and legal issues comprising' " Utah's claim for natural resource damages. *See Coopers & Lybrand,* 437 U.S. at 469 (quoting *Mercantile Nat'l Bank v. Langdeau,* 371 U.S. 555, 558 (1963)).

More generally, appeal of the Order is collateral to the merits of the underlying claim because Utah and Kennecott negotiated

and submitted the Modified Consent Decree for the purpose of ending the litigation and avoiding a trial on the merits of the action. Thus, the review of the Modified Consent Decree, either by the district court in the first instance or by this Court on appeal, does not involve an inquiry into the merits of Utah's claim for natural resource damages. *Cf. In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106, 1118-19 (7th Cir.) (order approving subclass settlement was appealable as a collateral order because it was "completely separate from the merits of the action"), *cert. denied*, 444 U.S. 879 (1979).

* * *